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IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION I
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

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STATE OF TENNESSEE) evidentiary hearing requested **dc**
)
vs.) No. 2004-D-3113
)
PERRY AVRAM MARCH)

**MOTION TO DISMISS INDICTMENT FOR UNREASONABLE
DELAY IN COMMENCEMENT OF PROSECUTION**

Comes now the accused, by and through counsel, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8 and 9 of the Constitution of the State of Tennessee, Rules 12(b) and 47 of the Tennessee Rules of Criminal Procedure, and moves the Court to dismiss the indictment in this case for such unreasonable delay between the alleged commission of the offenses which are the subject of the indictment and commencement of adversarial proceedings as offends constitutional due process guaranties.

The three-count sealed indictment in this case was filed on December 8, 2004.¹

¹Mr. March was arrested pursuant to a capias on August 3, 2005. In *State v. Utley*, 956 S.W.2d 489 (Tenn. 1997), the Tennessee Supreme Court measured the delay from the commission of the offense until the defendant's arrest as implicating due process concerns, notwithstanding the issuance of an arrest warrant eight days after the offense occurred. There the

Count 1 of the indictment alleges that the Defendant killed the alleged decedent “on the **15th** day of **August, 1996**[.]” Count 2 alleges that the Defendant unlawfully disposed of a corpse “on a day in **August, 1996**[.]” Count 3 alleges that the Defendant tampered with evidence “on the ____ day of **September, 1996**[.]” (All boldface in original.)

The State’s response to the Defendant’s motion for bill of particulars states as to the date and time of the offense alleged in Count 1:

As to Count one, the State is unable to give an exact time of the offense. Janet March was last seen alive at 5:00 p.m. on August 15, 1996, by anyone other than the defendant. She was reported missing on August 29, 1996. For the purpose of alibi notification, the State would request a time frame of 5:00 p.m. on August 15, 1996 until 8:00 a.m. August 16, 1996. . . .

As to Count 2, this response recites:

As to Count two of the indictment, the State is unable to give a specific time of the

offense was committed on June 4, 1987, an arrest warrant was issued on May 27, 1987, and an indictment was returned during September 1992. *Id.*, at 491.

Where the initial charging instrument is an indictment, it is unclear whether the relevant time period for unreasonable delay/due process analysis runs merely until the finding of the indictment or until the accused is actually in custody. The Supreme Court in *State v. Carico*, 968 S.W.2d 280, 284 (Tenn. 1998), opined that “in determining if there has been a violation of constitutional due process, the time between the commission of the offense and the commencement of prosecution will . . . be considered.” By statute in this jurisdiction, a prosecution is “commenced” by, among other things, the finding of an indictment or the issuance of an arrest warrant. *See*, Tenn. Code Ann. § 40-2-104. If, as in *Utley, supra*, the time between issuance and execution of an arrest warrant is subject to due process rather than speedy trial analysis, does the same apply to the time between issuance and service of a *capias*?

The instant Defendant contends, however, that no matter whether the applicable time period ends on December 8, 2004 or on August 3, 2005, the same analytical framework applies.

offense. It could have occurred anytime from August 15, 1996 until August 29, 1996. The State is not asking for notice of alibi as to this count. . . .

As to Count 3, this response recites:

As to Count three of the indictment, the State is unable to give a specific time of the offense. The computer hard drive was present on September 10, 1996 and was missing on September 17, 1996. For the purpose of alibi notification, the State would request a time frame from 12:00 p.m. on September 16, 1996 until 10:30 a.m. on September 17, 1996. . . .

A search warrant authorizing a search of the person of Perry March and of the marital residence shared by the Defendant and Janet March was issued and executed on September 17, 1996.

Unreasonable delay between the commission of the offense and the commencement of the prosecution may violate the constitutional right to due process. *State v. Carico*, 968 S.W.2d 280, 284 (Tenn. 1998). “[A] defendant may invoke due process to challenge delay both before and after official accusation.” *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

The lapse of time between the reporting to police of Janet March’s disappearance on August 29, 1996 and the filing of the indictment on December 8, 2004 is eight years, three months and nine days. The lapse between this reporting to police and the arrest of the Defendant is eight years, eleven months and five days.

The Supreme Court of Tennessee has opined in *State v. Carico*, 968 S.W.2d 280 (Tenn. 1998), that passage of a lesser period² from the time the offense was reported to governmental authorities until the prosecution was commenced than that present at bar requires analysis of whether due process is abridged by the delay. In *State v. Utley*, 956 S.W.2d 489 (Tenn. 1997), a five year delay from the commission of the offense to the defendant's arrest was held to raise due process concerns and required a due process analysis under the United States and Tennessee Constitutions. *Id.*, at 496.

The Defendant would show that the State has manipulated the timing of this prosecution so as to gain a tactical advantage over the Defendant, and the Defendant has been prejudiced in his ability to defend as a result. For example, the indictment was not found until after a civil determination of Janet Levine's death had been rendered by the Probate Court of Davidson County during 2004 and a civil default judgment for wrongful death had been rendered against Mr. March in the Third Circuit Court for Davidson County, also during 2004.

Testimony at the bond hearing in this matter disclosed that police have received several reports of sightings of Janet March which occurred later than the date she is alleged

²In *Carico* the victim in May 1985 reported a child sex offense to a teacher, whereupon school officials reported the information to the Department of Human Services, whose employee "substantiated" the allegations and reported the results of her investigation to the District Attorney General. The arrest warrant did not issue until September 3, 1992. The State's response to a motion for bill of particulars identified that date of the offense as being an unspecified day of January 1985. 968 S.W.2d at 283-84.

to have been killed by the Defendant. The ability of the defense to currently investigate these sightings has likely been impaired by the passage of time.

The Defendant at the outset of the criminal investigation was represented by a very able and prominent member of the Nashville bar, who has since left the practice of law. Moreover, prior counsel's files and work product, which likely would be quite useful in preparation of Mr. March's defense, are now unavailable.

THE FOREGOING PREMISES CONSIDERED, the Defendant respectfully moves the Court to dismiss the indictment for such unreasonable delay in the commencement of the prosecution as offends constitutional due process guaranties. Defense counsel request leave to amend the factual bases for this motion should further information become known to them. The Defendant requests an evidentiary hearing on this motion.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 16th day of February, 2006.


JOHN E. HERBISON